UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

A.J. O'NEAL, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER SL07528810209 DATE: FEB 17 1989

Asa H. Hoke, Esquire, Memphis, Tennessee, for the appellant.

George Whitten, Memphis, Tennessee, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the initial decision issued on July 25, 1988, which dismissed the appellant's petition for appeal for lack of jurisdiction. For reasons set forth below, the Board GRANTS the petition for review under 5 C.F.R. § 1201.115, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order. The Board DISMISSES the appeal for lack of jurisdiction.

BACKGROUND

On July 16, 1987, the agency issued the appellant a notice proposing to remove him from the position of Carrier Technician for repeated periods of absence without leave (AWOL). Subsequently, on September 9, 1987, the agency and the appellant entered into a "Last Chance Agreement" (Agreement). *See* Initial Appeal File (IAF), Tab 6. Under the Agreement, the proposed removal was held in abeyance for 1 year provided that the appellant comply with the terms of the Agreement. *See Id.* As part of the Agreement, the appellant assented to serve a 1-year probationary period in which he would maintain satisfactory attendance without one period of AWOL. The parties agreed further that any violation of the Agreement by the appellant would result in the issuance of the decision notice. *See Id.* The appellant also agreed to waive his right of appeal to the Merit Systems Protection Board for 1 year. *See Id.* The appellant, his union representative, and the agency's labor relations representative all signed the Agreement. *See Id.*

On April 6, 1988, during the 1-year period provided by the Agreement, the agency issued to the appellant the notice of removal, effective April 15, 1988. The agency informed the appellant that he had been AWOL on eleven occasions and had failed to maintain satisfactory attendance as stipulated in the Agreement. *See* IAF, Tab 6.

On April 28, 1988, the appellant filed a petition for appeal of the agency's action with the Board's St. Louis

Regional Office, and he requested a hearing. In the petition, the appellant asserted that although he had been absent, he had provided proper documentation to the agency of all the absences pursuant to the Agreement. *See Id.*, Tab 1. He also claimed that all but two of the absences had been approved by his supervisor, and he had been paid by the agency for periods in which the agency claimed he was AWOL.

The administrative judge dismissed the petition for appeal for lack of jurisdiction. The administrative judge found that: (1) The Agreement was unambiguous, valid, and freely entered into by the parties; (2) the appellant did not show any agency coercion or bad faith concerning the Agreement, and the Agreement was enforceable under *McCall v. United States Postal Service*, 839 F.2d 664 (Fed. Cir. 1988); (3) the appellant was not entitled to the requested hearing because there were no factual issues of dispute concerning the Agreement; and (4) the Board lacked jurisdiction over the appeal because the appellant waived his right of appeal to the Board. *See* initial decision at 2-3.

The appellant has now petitioned for review of the initial decision. In his petition for review, the appellant asserts that the Agreement is void as against public policy because it denies him his right of appeal and allows the agency to take an arbitrary removal action against him. The appellant also contends that he raised a non-frivolous claim of fact relating to Board jurisdiction, and that the administrative judge erred in denying him a hearing on the

issue of jurisdiction. The agency has responded to the petition.

ANALYSIS

1. The Last Chance Agreement is not void as against public policy.

The Board has previously upheld last chance agreements of the type at issue. *See Green v. Department of Health and Human Services,* MSPB Docket Nos. PH075287C0153 and DC07528710490 at 9-10 (October 31, 1988); *Ferby v. United States Postal Service*, 26 M.S.P.R. 451, 455-56 (1985). Additionally, the Court of Appeals for the Federal Circuit recently found that such agreements are not void as a matter of public policy. *See McCall v. United States Postal Service*, 839 F.2d 664, 668 (Fed. Cir. 1988).

Moreover, in *McCall*, the court found that the agreement itself serves as a check on arbitrary action by the agency. *McCall*, 839 F.2d at 667. The court stated, "[i]f an agency acts in bad faith or takes other arbitrary and capricious action, as a breaching party it would not be able to enforce the agreement." *Id.* In the present case, however, we find that the agency has not acted in bad faith.

The appellant claims that the agency breached the Agreement by categorizing his absences as AWOL after approving them and/or paying him for those periods. The appellant, however, has not shown that the agency either approved of or paid the appellant for all eleven periods of AWOL at issue. The appellant has proffered evidence

regarding some but not all of the periods of AWOL. *See* IAF, Tab 7. Furthermore, this evidence does not indicate that the appellant complied with the Agreement's provision regarding absence from work. *See Id.* We note that the Agreement stipulated that all questionable documentation regarding absences would be sent to the agency's Human Resources office for a final ruling on the acceptability of the documentation. *See Id.*, Tab 6. As in *McCall*, the Agreement itself serves as a check on arbitrary agency action. *See McCall*, 839 F.2d at 667. Thus, the appellant has not established bad faith on the part of the agency by enforcing the Agreement. *See McCall*, 839 F.2d at 667.[1]

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[1] The appellant also contends, for the first time, that the Agreement constitutes handicap discrimination because it results in his removal for absences that were due to his alleged physical incapacitation, and that the Agreement violates public policy because it required him to waive the right to raise the defense of handicap discrimination before the Board. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *See, e.g., Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). *See also McCall*, 839 F.2d at 666 note. We find that the appellant has not made such a showing in this case. Accordingly, we need not consider these contentions further. Furthermore, while we note the appellant's additional contention raised for the first time in the petition for review that the Agreement also violates public policy because it purports to waive his right to file a complaint with the Equal Employment Opportunity Commission, the validity of the waiver is not before us. *See Banks*, 4 M.S.P.R. at 271. Moreover, even if that attempted waiver is void, that would not affect the validity of the other portions of the Agreement. *See McCall*, 839 F.2d at 666 note.

2. The appellant is not entitled to a hearing on the issue of jurisdiction.

There is no statutory requirement that the Board hold a hearing on the threshold issue of jurisdiction. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427 (Fed. Cir. 1984). *See also McCall*, 839 F.2d at 669. The statute, 5 U.S.C. § 7701(a), provides a right to a hearing on the merits, but only after jurisdiction has been properly invoked. *See Manning*, 742 F.2d at 1427-28, citing *Rose v. Department of Health and Human Services*, 721 F.2d 355, 357 (Fed. Cir. 1983). It is appropriate for the Board to hold a hearing where the appellant's allegations raise non-frivolous issues of fact relating to jurisdiction which cannot be resolved simply on submissions of documentary evidence.[2] *Manning*, 742 F.2d at 1428. *See also McCall*, 664 F.2d at 669. In the present case, however, the appellant has not raised a non-frivolous claim of jurisdiction. Accordingly, we find that the administrative judge did not err by denying the appellant's request for a hearing on the issue of Board jurisdiction over the appeal.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

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[2] The appellant bears the burden of establishing jurisdiction by a preponderance of evidence. 5 C.F.R. § 1201.56(a)(2). To meet this burden, the appellant must proffer sufficient evidence to enable the administrative judge reasonably to conclude that the allegations are non-frivolous. *See Stokes v. Federal Aviation Administration*, 761 F.2d 682, 685-86 (Fed. Cir. 1985).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.